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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 759

ERNEST L. LEVINE,

Petitioner,

vs.

DAVID H. BERMAN AND DOROTHY BERMAN, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF DAVID H. BERMAN CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY.

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THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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The statement of Respondents (p. 4) that Petitioner testified "that he did not intend to return to his former position with respondents when he applied to the court for an order of restoration" is refuted by their own reference to "(Tr. 66-71)". In answer to the question whether he knew on December 23, 1947 when he made the application for restoration that he was not going to take the job, he answered (Tr. 70):

> "No, I didn't, I did not know anything until after I would review the situation, and talk it over with the United States District Attorneys' office, and then decide."

Even if he intended not to return to his former position subsequent to November 1947, after he obtained a better job, this would not constitute "fraud" or "lack of good faith", as he applied for the restoration on December 18, 1945, and acted in good faith throughout the period when his appeal was pending up to November 1947 when he obtained his new position (Tr. 70). Assuming *arguendo* that petitioner had no intention to return to his former position in December 1947 it was necessary for him to obtain the order of restoration as a *prerequisite* to his right to recover damages. This is *conceded by respondents* when they say (p. 9):

> "Since the power to compensate for lost wages is an incident to restoration, it was incumbent upon the petitioner to secure an order of restoration to support his application for damages."

This *admission cannot be reconciled with the finding* of the Master that because Petitioner did not intend to return to his position his application to the court "was not made in good faith" (Tr. 45: F. 13).

The statement (p. 6) that petitioner told one of the respondents that he would take $25,000 to settle his demands was discussed in the petition (pp. 25-26) and it was shown that *such evidence was clearly incompetent,* and the authorities cited are not disputed by the respondents. It is clear, therefore, that the master's finding of absence of good faith on this ground cannot be sustained as a matter of law.

Respondents rely on the master's finding as to "perjury" and "fraud", "deceit" and lack of "good faith", but *made no attempt to* refer to the record to justify these findings. It appears from the Petition (pp. 26-35) that there is *not an iota of evidence* tending to support such findings. The authorities cited in the petition (p. 25) that the rule that findings of facts of a Master approved by a Court will

not be disturbed is *inapplicable* to findings which have *no support in evidence.*

The assertion (p. 7) that the "various courts of appeals" have "uniformly" held that the words "shall have power" are "discretionary" is *refuted* by the authorities cited in the petition (pp. 15-17). No court has held that a court may, under the power of discretion, deny damages which are found by the court to have been sustained, as shown in our brief (p. 35). There is no answer to the point urged in the petition (p. 35) that under no theory could the court have refused to award damages for the $4,725.00 which was found due Petitioner, even under Respondents' evidence.

The contention (p. 7) that this case presents "the rather simple question" whether the court "abused" its discretion in denying damages to the petitioner is clearly *unsound* and is *refuted* by the "question presented" in the Respondents' answer (p. 2).

It is interesting to note that respondents who cite *Trailmobile Co.* v. *Whirls,* 331 U. S. 40, 91 L. Ed. 1328, on another point failed to notice that in that case this court held that if *res adjudicata* was involved, the court would have *reviewed* the question, and that the questions presented concerning the Act in question was of great importance as to warrant the issuance of the writ.

Respondents quote (p. 7) from the opinion in the *Trailmobile* case that the "action is equitable". They failed to state that their quotation is *not* from the opinion of the court but from the *dissenting* opinion.

The mere statement of respondents (p. 7) that *they "submit"* that the facts found by the master "are amply supported by the evidence" *without any reference to the evidence* is, of course, *meaningless.* The evidence was discussed in the petition (pp. 23-35) and it was shown that the findings as to "fraud", "deceit", "perjury" and "bad

faith" *are not based on any evidence in the case.* No reply is required to the point (pp. 7-8) that "even assuming that the court below misconceived the facts, this is not the type of a question which calls for review by this court."

The contention that the decision on the second appeal is not inconsistent with the decision on the former appeal does not merit a reply as a mere comparison of the two decisions demonstrates the absurdity of the contention.

The decisions which respondents cite (p. 10) on the point that where the evidence is *conflicting* the findings of a Master approved by a court will not be disturbed have no application to the instant case where *the question of conflicting evidence is not involved.* The Writ is sought on the ground that *there is a complete lack of evidence to sustain the findings* to which the objections were filed, and respondents were *unable* to show any basis for the findings, except their own statement.

For the reasons urged in the original petition and in this reply we submit that this court should grant the discretionary Writ of Certiorari to review the decision below.

Respectfully submitted,

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